

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis  
Bankruptcy Judge  
Sacramento, California

October 24, 2013 at 1:30 p.m.

1. [13-20155-E-13](#) JEFFREY AKZAM  
[13-2103](#)  
AKZAM ET AL V. OPTION ONE  
MORTGAGE CORPORATION ET AL  
Thru #2

MOTION TO DISMISS ADVERSARY  
PROCEEDING BY HOMEWARD  
RESIDENTIAL, INC., ET AL.  
8-30-13 [[64](#)]

**Final Ruling:** The court having ordered that pursuant to 28 U.S.C. § 1334(C) (1) the court abstains from conducting any further hearings or other proceedings concerning the complaint, any defenses thereto, and the substantive right of the parties, Dckt. 87, the Motion is dismissed as moot.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss having been presented to the court, the court having abstained from hearing any further proceedings, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is dismissed as moot, the court having abstained, Civil Minute Order Dckt. 87.

October 24, 2013 at 1:30 p.m.

2. [13-20155](#)-E-13 JEFFREY AKZAM  
[13-2103](#)  
AKZAM ET AL V. OPTION ONE  
MORTGAGE CORPORATION ET AL

AMENDED MOTION TO DISMISS FIRST  
AMENDED COMPLAINT BY SAND  
CANYON CORPORATION  
9-18-13 [[82](#)]

**Final Ruling:** The court having ordered that pursuant to 28 U.S.C. § 1334(C)(1) the court abstains from conducting any further hearings or other proceedings concerning the complaint, any defenses thereto, and the substantive right of the parties, Dckt. 87, the Motion is dismissed as moot.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss having been presented to the court, the court having abstained from hearing any further proceedings, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is dismissed as moot, the court having abstained, Civil Minute Order Dckt. 87.

3. [11-44878-E-7](#) VLADIMIR/SNEZHANNA  
[12-2573](#) SEMCHENKO DLB-15  
U.S. TRUSTEE V. BRYANT

CONTINUED MOTION FOR PROTECTIVE  
ORDER AND/OR MOTION TO QUASH  
9-6-13 [[205](#)]

**CONT. FROM 10-3-13**

Local Rule 9014-1(f)(2) Motion - Continued Hearing.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff U.S. Trustee and to Bank of America on September 6, 2013. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

**Tentative Ruling:** The Motion for Protective Order was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

**The court's tentative decision is to deny the Motion for Protective Order.**

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

#### **FIRST SCHEDULED HEARING**

On October 3, 2013, the a person from David L. Bryant's office contacted the courtroom deputy for Department E to notify the court that Mr. Bryant was unable to attend due to a medical emergency. Allen Massey, attorney for the U.S. Trustee appeared at the scheduled time for the hearing on this motion and advised the court that he was at a deposition with Mr. Bryant when paramedics were called and Mr. Bryant taken to the hospital.

The court continued the hearing on the motion. Since the discovery deadline is fast approaching, to prevent Mr. Bryant's unavailability being a *de facto* granting of the motion if it is continued, the court extended the October 18, 2013 discovery deadline for the subpoena which is the subject of this motion to quash though and including November 22, 2013. The discovery deadline was not extended by this ruling for any other purposes.

#### **OCTOBER 24, 2013 HEARING**

Defendant David Bryant seeks an order quashing a subpoena and issuance of a protective order to prevent abuse by the United State Trustee ("UST").

**October 24, 2013 at 1:30 p.m.**

**- Page 3 of 8 -**

The UST issued a *subpoena duces tecum* to Bank of America, requesting that the custodian deliver to them the following:

1. Copies of signature cards, bank statements, checks and other withdrawal documents (front and back), and deposit slips and/or deposit receipts with deposited check or other supporting documents comprising the deposit (Front and back) for account number [ending in] 6597.
2. Copies of signature cards, bank statements, checks and other withdrawal documents (front and back), and deposit slips and/or deposit receipts with deposited check or other supporting documents comprising the deposit (Front and back) for any other account for David Leigh Bryant; David L. Bryant; David Bryant; Winchester Consulting, LLC; and any other account(s) for which Mr. Bryant is signer of the account(s).

Exhibit A, Dckt. 207.

Defendant argues that the UST is "attempting to delve into matters in which it has no business" and that the personal financial records have nothing to do with the underlying allegations of the case, the relief being sought and are not reasonably calculated to the discovery or remotely admissible evidence related to the subject matter, claims or defenses at issue.

#### **UST OPPOSITION**

UST opposes Defendant's motion, stating that Defendant has not provided a basis for quashing the subpoena or for entering a protective order. UST argues that Defendant has not shown that the Bank of America subpoena subjects him to undue burden or that the documents requested requires a disclosure of a trade secret or other confidential research, development or commercial information. The UST states that Defendant has not shown that a protective order is warranted under Rule 26(b)(2)(C).

UST argues that the documents he seeks are relevant to the adversary in that they may reveal the names of clients from which Defendant has received monies that could be compared to names of bankruptcy cases, may reveal who Defendant's employees are, or have been, so they can be the source of information or deposed concerning the preparation of bankruptcy documents at Defendant's house/office. UST argues that this information may also reveal whether Winchester Consulting is anything other than Defendant's alter ego or an assignee.

Lastly, the UST states that the Bank of America subpoena and third-party sources are the only available evidence, as Mr. Bryant has failed to provide responses or attend his deposition.

#### **DEFENDANT'S REPLY**

Defendant replies, stating that the names of Bryant's clients are not in his bank records, that the UST already is in possession of his clients in the "Decaf list" and that most of his clients pay in cash, and would not be identifiable in his accounts.

**October 24, 2013 at 1:30 p.m.**

**- Page 4 of 8 -**

Similarly, Defendant argues that the names of Bryant's employees and contractors are not his bank records. Defendant states that he has not paid his employees and/or contractors by check. Defendant argues that the UST already has five or so former employees.

Defendant argues that UST's alter ego theory fails because it is "of no moment" and completely irrelevant.

Lastly, Defendant argues that UST's subpoena is to harass Defendant.

#### **UST'S REQUEST FOR JUDICIAL NOTICE**

The UST requests the court to take judicial notice of documents from the Court's files in *In re Frances E. Branch*, case no. 13-28174, for those portions that relate to David Bryant's account at Bank of America to include check copies.

#### **DISCUSSION**

Federal Rule of Civil Procedure 26(b), as incorporated by Federal Rule of Bankruptcy Procedure 7026, states that unless otherwise limited by court order, the scope of discovery is as follows:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense - including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of person who know of any discoverable matter...Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence...

Fed. R. Civ. P. 26(b) (1). A subpoena may seek information likely to lead to the discovery of information relevant to the matters at issue in the case. Fed. R. Civ. P. 26(b) (1).

The general rule is that a party has no standing to quash a subpoena served upon a third party, except as to claims of privilege relating to the documents being sought." *Windsor v. Martindale*, 175 F.R.D. 665, 668 (D. Colo. 1997). Here, Defendant does not assert a privilege to quash a subpoena served on the third party, Bank of America, N.A., for his bank records. The only argument Defendant provides is that the UST is "attempting to delve into matters in which it has no business."

The Supreme Court has determined that bank records "lack...any legitimate expectation of privacy" and held that subpoenas seeking a party's bank records may not be quashed on this basis. *United States v. Miller*, 425 U.S. 435, 436 (1976); *In re Grand Jury Investigation M.H. v. United States*, 648 F.3d 1067 (9th Cir. 2011) (holding the Fifth Amendment privilege against self-incrimination is inapplicable to a subpoena for foreign bank account records). Thus, Defendants argument of privacy in his records is not well founded.

Further, the requested records are relevant to this Adversary Proceeding. The UST has asserted that David Bryant has run a business as a bankruptcy petition preparer, and has failed to comply with the requirements, duties, and limitations imposed by 11 U.S.C. § 110. In conducting this business, the UST has alleged and is advancing claims that David Bryant charged and received fees from consumers in excess of the \$125.00 maximum for bankruptcy petition preparer services in this District.

#### Protective Order

Local Bankruptcy Rule 7026-1(d) also provides a mechanism for addressing abusive discovery practices: "[i]f any party believes that any such proposed discovery is burdensome, oppressive, or otherwise improper, that party shall have the burden of seeking a protective order against such proposed discovery in accordance with the provisions of Fed. R. Civ. P. 26(c) and, if applicable, Fed. R. Civ. P. 45."

Pursuant to Federal Rule of Civil Procedure 26(c) as incorporated by Federal Rule of Bankruptcy Procedure 7026, a party may move for a protective order and the court "may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" by specifying the terms for discovery. The motion for a protective order must certify that the movant has attempted in good faith to confer and resolve the dispute without court action. *Id.*

Here, in considering the Defendant's standing and basis for any protective order, Defendant has not shown sufficient evidence for a protective order pursuant to Federal Rule of Civil Procedure 26(c). The UST's subpoena does not appear to be one that annoys, embarrasses, oppresses or is an undue burden on Defendant. Furthermore, Defendant has not certified that he has attempted in good faith to confer and resolve the dispute without court action. The court finds that no grounds have been presented for the issuance of a protective order for the outstanding discovery.

#### Quash Subpoena

Federal Rule of Civil Procedure 45(c) states,

(c) Protecting a Person Subject to a Subpoena...

...(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

(I) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person--except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(I) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(I) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

Again, Defendant has not shown sufficient grounds for the court to quash the subpoena issued by the UST. First, the only grounds the court can discern the motion, is that the information sought is not relevant to the UST's complaint. This is not sufficient grounds under Federal Rule of Civil Procedure 43(c)(3)(A) or (B). Defendant *in his reply* attempts to argue that the subpoena is an undue burden. The court is not convinced by this late argument. The subpoena on the third party bank, Bank of America, does not appear to be an undue burden. The only burden Defendant states is that the accounts are of a very personal nature and the UST has ulterior motives with the account information. The court also does not find this argument credible. The account information appears to be encompassed in the very broad discovery definition of "any matter that bears on, or reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Hickman v. Taylor*, 329 U.S. 495, 501 (1947). The court will not quash the subpoena with the request in the present motion.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Protective Order filed by Defendant having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is denied.